

# Home Care Developments

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## NYC Vaccine Mandate Taking Effect next Monday

On December 15, 2021, New York City released [GUIDANCE](#) on the private employer vaccine mandate which is scheduled to take effect Monday, December 27. As we had reported, this mandate would apply to New York City employees who perform in-person work or interact with the public, and it would require them to show proof they have received at least one dose of a COVID-19 vaccine by December 27. Partially vaccinated workers then have 45 days to show proof of their second dose. Since the majority of home care providers have already been covered by the DOH's mandate since August 26, the following is only relevant to New York City fiscal intermediaries.

### Covered Businesses and Workers

The vaccine mandate applies to all employers that employ **one or more** workers in New York City or that maintain a workplace in New York City. The mandate also applies to self-employed individuals and sole proprietors who work at a workplace or interact with workers or the public in the course of their business. Thus, a consumer – even if he or she is not a joint employer – could be covered by this mandate.

Notably, the order does **not** apply to businesses who are already subject to “another Order of the Commissioner of the Department, Board of Health, the Mayor, or a State or federal entity **that is in effect** and requires them to maintain or provide proof of full vaccination.” For instance, LHCSAs and CHHAs are already under a DOH order of vaccination and, thus, not covered by the City's mandate.

The vaccine mandate applies to all individuals who work in-person in New York City at a “workplace,” which is defined broadly as “any location, including a vehicle, where work is performed in the presence of another worker or member of the public.” Arguably, this language excludes a home setting since no member of the public or another worker are present in the home. However, there is ambiguity in this regard.

The mandate includes exemptions for:

1. Individuals who work from home and whose employment does not involve interacting in-person with co-workers or members of the public – **this is a potential carve-out that would might personal assistants who live with their consumer to be excluded from coverage**
2. Individuals who enter the workplace for a quick and limited purpose;
3. Non-New York City residents who are performing artists, athletes, or individuals accompanying such performing artists or athletes who do not have to display proof of vaccination pursuant to the Key to NYC program; **and**
4. Individuals who have been granted a reasonable accommodation (as discussed further below).

### Proof of Vaccination and Certifying Compliance

The mandate requires that covered employers verify each covered worker's vaccination status by doing one of the following:

1. **Maintaining a copy** of each worker's proof of vaccination or reasonable accommodation documentation;

2. **Maintaining a paper or electronic record** that includes: (a) the worker's name; (b) whether the worker is fully vaccinated; (c) for workers who submit proof of partial vaccination, the date by which proof of the second dose must be provided; **and** (d) for workers who do not submit proof of vaccination because of a reasonable accommodation, that such accommodation was provided; **or**
3. **Checking proof** of vaccination daily before allowing a worker to enter the workplace and maintaining a record of the verification.

While contract workers are covered by the mandate, employers may request that the contractor's employer confirm that the contractor is vaccinated in lieu of verifying proof of vaccination by one of the methods listed above. Businesses taking advantage of this option must maintain a record of the request as well as the confirmation from the contractor's employer.

The guidance goes on to explain that employers may accept the following forms of proof of vaccination: (1) A CDC COVID-19 vaccine card; (2) a New York City COVID-19 Safe App record; (3) A New York State Excelsior Pass/Excelsior Pass Plus; (4) A CLEAR Health Pass; and (5) other official vaccine records from the jurisdiction where the vaccine was administered, or from a healthcare provider or other approved immunizer who administered the vaccine, that provides the person's name, vaccine brand, and date of administration. A digital photo or photocopy of such record is also acceptable.

By December 27, businesses must also complete a [CERTIFICATE](#) affirming they are in compliance with the vaccine mandate and post the certificate in a public place.

#### **Exemptions from the Mandate**

The guidance also makes clear that employers must consider requests for reasonable accommodations related to the vaccine requirement from employees who request them because of disability, pregnancy, childbirth, lactation, religious beliefs or observances, or status as a victim of domestic violence, stalking, or a sex offense. Workers must request a reasonable accommodation by December 27 in order to continue working unvaccinated in a workplace covered by the order. Notably, the guidance states that employers may continue to allow workers who have requested an accommodation to enter the workplace while the request is pending.

Employers must maintain documentation stating the basis for granting accommodations for employees, including any supporting documentation provided by the requesting employee. The guidance provides employers with a [CHECKLIST](#) that can be used to evaluate the exemption or accommodation request. If an employer chooses to utilize these checklists, the lists should be kept on file and maintained as a record of any exemptions or accommodations that are granted by the employer. As with any other accommodation request in New York City, employers must provide a written communication of the employer's determination regarding the accommodation at the conclusion of the cooperative dialogue process.

The guidance provides the following, non-exhaustive list of conditions that may qualify for a permanent medical exemption: (1) the requesting employee had a severe allergic reaction after a previous dose or to a component of all three approved COVID-19 vaccines; or (2) the requesting employee has a known diagnosed allergy to a component in all three approved COVID-19 vaccines.

A **temporary medical exemption** may be granted if the requesting employee: (1) has presented medical documentation showing that they are within 90 days of monoclonal antibody or convalescent plasma treatment of COVID-19; (2) has presented medical documentation showing they recently underwent stem cell transplant, CAR T-cell therapy, or other therapy or treatment that would temporarily interfere with the worker's ability to respond adequately to vaccination; or (3) has pericarditis or myocarditis. Again, this list is non-exhaustive. The guidance also states that medical documentation must be from the worker's treating physician with a valid medical license.

For **religious accommodations**, the guidance provides the following reasons an employee may qualify for a religious accommodation: (1) the employee has explained/documented how the belief requires the employee not to be vaccinated; (2)

the employee has not taken other kinds of vaccinations previously, and if the employee has received other vaccines, they should explain why those vaccines were not against their religion; (3) the employee says their religious belief prevents them from allowing certain substances to enter their body; or (4) the employee says that they cannot take the vaccine because it was developed and/or tested using fetal cells that the worker is concerned may have been the result of an abortion, and the worker does not also take other medications similarly developed or tested using fetal cell derivative lines.

Given the exemptions allowed – and the expansiveness of the exemptions as compared to the DOH’s limited exemptions – CDPAP providers are likely to obtain a number of exemption requests from personal assistants who are not yet vaccinated.

### **Enforcement and Penalties for Noncompliance**

According to the Guidance, inspectors from various City agencies will begin enforcing the Order on December 27, 2021, and all inspectors, no matter which agency they are from, will be inspecting for compliance with the same requirements.

Although the Guidance Documents provide that the goal is to educate and work with businesses to help them achieve compliance, if a business refuses to comply, it would be subject to a fine of \$1,000 and escalating penalties thereafter if violations persist. If you have any questions about this topic, please do not hesitate to reach out.

No FI is likely to lose their “license” to operate as a fiscal intermediary for violation of this mandate, however, it is not advisable, especially for lead fiscal intermediaries, to garner attention by violating the City’s Order.

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## **OSHA Vaccine or Test Rule Back in Effect**

In an unexpected move, late on Friday night, the Sixth Circuit Court of Appeals lifted the stay on OSHA’s regulation requiring businesses with at least 100 employees to ensure that workers are either vaccinated or tested weekly and wear masks. Shortly thereafter, an emergency appeal was made to the United State Supreme Court. OSHA issued a statement over the weekend, stating that employers would have until January 10 to comply with the standard. Additionally, OSHA stated that it “will not issue citations for noncompliance with the standard’s testing requirements before Feb. 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”

As we had previously discussed, the OSHA rule would apply to fiscal intermediaries in New York to the extent they are considered a joint employer of the personal assistants. The issue is slated for Supreme Court review, but it is unknown how the Supreme Court will rule.

We will continue to monitor this issue and advise of any updates.

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## **And, the CMS Vaccination Mandate is Back on, in Some States at Least**

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On Wednesday, December 15, 2021, the Fifth Circuit Court of Appeals reversed a lower-level federal court decision and LIFTED the nationwide injunction that had been granted against the enforcement of the CMS vaccination mandate for covered providers. The Fifth Circuit held that the district court went too far in issuing a nationwide injunction. As a consequence of the Fifth Circuit’s decision, the CMS vaccination mandate is now technically only on hold for the States that had sued CMS; Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, Ohio, Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota and New

Hampshire. **The mandate is, thus, in effect in New York.** Prior to the Fifth Circuit's decision, CMS had suspended enforcement of the regulation. We expect CMS to clarify its stance on enforcement and compliance deadlines shortly, in view of the Fifth Circuit's decision.

As readers of our alerts will recall, the CMS regulation applies to CHHAs, but not to FIs and LHCSAs. Also, CHHAs are already covered by the Department's August 26 vaccination mandate. Thus, the CMS regulation has limited impact on CHHAs in New York State.



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[emina@poricaninlaw.com](mailto:emina@poricaninlaw.com)

315.269.1125

518.676.0192



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Poricanin | 90 State Street, Suite 700, Albany, NY 12207

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